No. 83-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

COMMUNITY HEALTH SERVICES OF
CRAWFORD COUNTY, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION FOR HOME CARE, PENNSYLVANIA ASSOCIATION OF HOME HEALTH AGENCIES, AMERICAN FEDERATION OF HOME HEALTH AGENCIES, AMERICAN HEALTH CARE ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, FEDERATION OF AMERICAN HOSPITALS, HOME HEALTH SERVICES AND STAFFING ASSOCIATION, AND NATIONAL COUNCIL OF HEALTH CENTERS IN SUPPORT OF AFFIRMANCE

JACK N. GOODMAN *
EUGENE TILLMAN
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for National Association for Home Care, et al., Amici Curiae

December 30, 1983

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-56

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,
v.
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION FOR HOME CARE, PENNSYLVANIA ASSOCIATION OF HOME HEALTH AGENCIES, AMERICAN FEDERATION OF HOME HEALTH AGENCIES, AMERICAN HEALTH CARE ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, FEDERATION OF AMERICAN HOSPITALS, HOME HEALTH SERVICES AND STAFFING ASSOCIATION, AND NATIONAL COUNCIL OF HEALTH CENTERS

INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of Respondent Community Health Services of Crawford County, Inc. (CHS). It is accompanied by the written consents of Petitioner and Respondent.

Amici curiae are several national and state organizations that together represent a broad spectrum of providers of health care services. The members of these organizations are home health agencies, hospitals, and

nursing homes and collectively account for the vast majority of the providers which render services to beneficiaries under Part A of the Medicare program. Many of these providers furnish all of their services to Medicare beneficiaries and, like CHS, are entirely dependent on Medicare reimbursement for the continuation of their patient care activities. CHS is a member of the National Association for Home Care and its state affiliate, the Pennsylvania Association of Home Health Agencies.

Providers of services enter into agreements with Petitioner Secretary of Health and Human Services (the Secretary) to furnish services to Medicare beneficiaries and, pursuant to the Medicare statutory scheme, primarily deal with the Secretary through fiscal intermediaries. These intermediaries serve as agents of the Secretary in explaining and implementing Medicare program policy. Intermediaries determine whether Medicare claims are covered, review and audit provider costs, and determine the amounts that will be reimbursed by the Medicare program. Given the central role of the Medicare program in enabling these providers to maintain services to their patients—the beneficiaries of the Medicare program—*amici curiae* have a strong interest in assuring that information received by their members from fiscal intermediaries is accurate and may reasonably be followed.

SUMMARY OF ARGUMENT

CHS repeatedly, over a three-year period, sought direction from its fiscal intermediary concerning the proper treatment of grants received under a federal employment program. The intermediary advised CHS that, under the Medicare regulations, the receipt and use of these funds would not result in a reduction of Medicare reimbursement. Based on that decision, CHS expanded its services using the additional funds it received. The Secretary subsequently disavowed her agent's interpretation of the rules and sought to require CHS to repay the amounts it had received in reliance on the intermediary's advice.

The Secretary incorrectly contends that this Court has categorically rejected the possibility of estoppel against the United States due to actions of government agents. At least in modern times, this Court has carefully avoided any such ruling; at the same time the courts of appeals have increasingly recognized that, in some circumstances, fundamental fairness dictates that private citizens not suffer the consequences of misrepresentations by government officials. The experience in the courts of appeals, and the limitations which have been placed on the role of estoppel, prevent occurrence of the widespread abuse and harm to Federal programs which the Secretary predicts.

Before taking any action, CHS in good faith sought a ruling from its fiscal intermediary, the entity it was expected to deal with and rely upon concerning Medicare reimbursement matters. The interpretation given CHS was not unreasonable, and CHS' reliance on it was wholly proper. Recovery, at this time, of the grants received by CHS would work a hardship on the innocent provider since CHS has spent the funds on other patient care services. Recoupment would also harm CHS' patients—the beneficiaries of the Medicare program and others unable to pay for their care—through the resulting diminution of services. In these circumstances, the decision of the court of appeals holding that the Secretary is estopped from seeking recoupment should be affirmed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY ESTOPPED THE SECRETARY FROM RECOVERING MEDICARE PAYMENTS MADE PURSUANT TO THE ADVICE OF THE SECRETARY'S AGENT

CHS is a provider of home health services under the Medicare program, 42 U.S.C. § 1395 *et seq.* After receiving funds under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801 *et seq.*, CHS sought advice from Travelers Insurance Company, the fiscal intermediary which served as the agent of the Sec-

retary, concerning whether the amounts paid under CETA should reduce costs otherwise reimbursable under Medicare. Over a three-year period, the intermediary *repeatedly* assured CHS that no offset was required, and CHS expanded its operations and filed its Medicare cost reports consistent with that advice. Subsequently, the Secretary repudiated the interpretation of her agent and sought to recover the payments to CHS which resulted from the failure to offset the CETA funds. The United States Court of Appeals for the Third Circuit held, however, that CHS' reliance on the advice given by the Secretary's agent estopped her from recouping the funds paid to CHS. *Community Health Services of Crawford County, Inc. v. Califano*, 698 F.2d 615 (3d Cir. 1983).

The Secretary argues that the United States may never be estopped from enforcing the laws, and that to permit the government to be estopped by acts of its agents in any circumstances would violate constitutional principles and subject the government to uncontrollable liability. The Secretary further contends that estoppel, even if appropriate in some circumstances, was not properly applied in the case before the Court.

The cases decided by this Court, at least those in modern times, do not support the Secretary's arguments; this Court, and to an increasing degree the courts of appeals, have not established an absolute rule that prevents assertion of equitable estoppel against the government. Neither constitutional restrictions nor the other specters of fiscal disaster posited by the Secretary are supported by the facts before the Court or by the experience of the courts of appeals. The case for estoppel is especially strong here since the structure of the reimbursement program under Medicare, rather than preventing CHS from relying on the advice given by the fiscal intermediary, in fact gave it no choice but to rely on the intermediary's conclusion to its detriment. To permit the government to repudiate that decision would undermine the administrative scheme by which Medicare is operated.

I. Principles of Equitable Estoppel Do and Should Apply to the Federal Government

Contrary to the argument of the Secretary (Pet. Br. 18-21), this Court has not squarely rejected the application to the government of principles of equitable estoppel. While older cases such as *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), do contain language appearing to bar the assertion of estoppel against the government,[1] modern cases have not reflected the absolute position asserted by the Secretary. In *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981), although determining that no basis for estoppel existed in that case, the Court stated that it "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations. . . ." Similarly, in *INS v. Miranda*, 103 S. Ct. 281 (1982), while holding that the delay in processing a visa petition would not justify estopping deportation proceedings, the Court very carefully avoided ruling on the question of whether estoppel could properly be imposed in other circumstances.[2]

By contrast, the Court implicitly accepted estoppel in *Moser v. United States*, 341 U.S. 41 (1951), where it unanimously held that incorrect advice given by the State

---

[1] That position, however, was not uniform even in earlier cases. In United States v. Stinson, 197 U.S. 200 (1905), *aff'g*, 125 F. 907 (7th Cir. 1903), the Court affirmed a decision of the Seventh Circuit estopping the government from bringing an action against an individual and treating the government in the same manner as a private party.

[2] Further, the Court rejected as "unpersuasive" an analysis based on whether the use of estoppel would result in expenditure of public funds. 103 S. Ct. at 283-84. The implication of the Court's reasoning is that the determination of whether estoppel applies should be based on the facts of each case, rather than upon formalistic distinctions. Thus, the Secretary's contention (Pet. Br. 22-23) that estoppel is particularly unavailable in cases involving public monies is based on a distinction apparently rejected by this Court.

Department prevented the United States from claiming that an immigrant had waived his right to citizenship, despite the fact that *statutory* language establishing the waiver of citizenship was quoted on the face of the application Moser signed. While the Court in *Moser* spoke of an absence of knowing waiver, that result flowed from a conclusion that the incorrect advice given Moser barred the United States from relying on the contrary statutory language Moser was aware of—in other words, estoppel. Both courts and commentators have considered *Moser* to be a case of estoppel. *See, e.g., United States v. Lazy FC Ranch*, 481 F.2d 985, 988-89 (9th Cir. 1973); 4 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 7-9 (2d ed. 1983).[3]

The courts of appeals have also recognized estoppel claims against the government in differing circumstances, both before and after *Schweiker v. Hansen*. They have found that the government can be estopped "where justice and fair play require it," and where "the government's wrongful conduct threatens to work a serious injustice and . . . the public's interest would not be unduly damaged by the imposition of estoppel." *United States v. Lazy FC Ranch*, 481 F.2d at 988, 989; *see, e.g., Home Savings and Loan Association v. Nimmo*, 695 F.2d 1251 (10th Cir. 1982); *Donovan v. Laborers' International Union Local 120*, 683 F.2d 1095 (7th Cir. 1982); *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982); *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982); *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982); *Akbarin v. INS*, 669 F.2d 839 (1st Cir. 1982); *N. Jonas & Co. v. EPA*, 666 F.2d 829 (3d Cir. 1981); *Investors Research Corp. v. SEC*, 628 F.2d 168 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); *Hansen v. Harris*, 619 F.2d 942, 959 (2d Cir. 1980) (Newman, J., concurring) (listing cases), *rev'd, Schweiker v. Hansen*, 450 U.S. 785 (1981); *United*

[3] In Montana v. Kennedy, 366 U.S. 308, 314-15 (1961), the Court, while concluding that no reasonable reliance on misinformation had been demonstrated, noted that it was not addressing the question of whether in some circumstances conduct of United States officials may give rise to estoppel.

States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966).

The Secretary argues that estopping the government would violate the separation of powers doctrine by substituting judicial pronouncements for the will of Congress. Such an argument might be appropriate were estoppel invoked to defeat an express mandate of Congress. For example, in *Worley v. Harris*, 666 F.2d 417, 421-22 (9th Cir. 1982), a Social Security case involving a failure to offset disability benefits, the claim of estoppel was rejected because the offset was clearly required by statute.[4] Cases involving the application *vel non* of a statutory standard in a particular case should also be distinguished from circumstances where the courts would be asked to overcome the intent of Congress in the overall operation of a government program. Neither situation, however, is present in the instant case. Although the Secretary is directed to determine the "reasonable cost" of services provided under Medicare, Congress did not speak to the treatment by providers of grants received under CETA, or to whether such grants had to be used to reduce Medicare reimbursement.

Thus, contrary to the Secretary's contention (Pet. Br. 22-23), there was no explicit Congressional directive requiring exclusion of CETA funds from CHS' "reasonable cost"[5] or mandating the reopening of CHS' earlier cost reports. Certainly estopping particular actions of administrative officials, even though those actions are taken within a broad statutory mandate, does not so contravene Congressional direction as to raise a question under the separation of powers doctrine. As the Seventh Circuit concluded,

---

[4] It should be noted, however, that the holding in *Moser* permitted Moser to retain his citizenship even though he had violated an express statutory condition.

[5] Indeed, as we discuss *infra*, even the Secretary's regulations do not contain such an explicit ruling.

> "[R]eliance on a separation of powers rationale to preclude estoppel against the government is considerably less persuasive where only an agency's own regulations are at stake than it would be where adherence to government misinformation threatens to contravene an explicit statutory requirement."

Portmann v. United States, 674 F.2d 1155, 1159 (7th Cir. 1982).

Recognition of estoppel in appropriate cases will also not ineluctably lead to "countless" claims and "intolerable burdens" on government operations (Pet. Br. 24, 25). Where there is little proof of erroneous advice, *N. Jonas & Co. v. EPA*, 666 F.2d 829, 934 (3d Cir. 1981), or where the advice given was at odds with clearly articulated policy or rules, *Werner v. Department of Interior*, 581 F.2d 168, 172 (8th Cir. 1978), or where little or no effort was made by the private party to determine whether the advice given was correct, *Lavin v. Marsh*, 644 F.2d 1378, 1383-84 (9th Cir. 1981), equity should not prevent adherence to established standards. *See Nason v. Kennebec County CETA*, 646 F.2d 10 (1st Cir. 1981) (no estoppel where recipient was warned its proposed action would be improper and government sought recoupment within three months).

Similarly, application of normal principles of equity will ensure that no excessive harm will be caused the government or the public through estoppel. The Ninth Circuit has clearly recognized the duty of courts in cases where estoppel is claimed against the government to "balance the countervailing interest of the public" to prevent undue damage. "These policy factors may militate against application of estoppel even though the technical elements of the doctrine are present." *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *see Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *United States v. Harvey*, 661 F.2d 767, 773 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 74 (1982); *cf. Mathews v. Eldridge*, 424 U.S.

319, 334-35 (1976) (balancing of private and governmental interests in Due Process analysis); D. DOBBS, REMEDIES 52-53 (1973). The harms foreseen by the Secretary are thus not inherent in the application of estoppel in some cases, and do not appear to have occurred despite the recognition of estoppel by the courts of appeals for several years.

Moreover, estopping the government from taking action against those misled by its agents promotes sound policy. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), the Court declared that depriving a private party of substantive rights due to the negligence of government officials was a deprivation of Due Process for which the private party should not have to bear the burden. Similarly, the Court has held that a person cannot be criminally convicted for conduct which a government official advised was proper, even though it was contrary to established law. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959).

If an agent of the Secretary misleads a party such as CHS into expending funds based on anticipated reimbursement, imposing the cost of the government's error on CHS offends the same notions of fairness. As Justice Jackson remarked,

> "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street."

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting). In the case of Medicare (or similar Federal programs) which relies on participation by private organizations to provide public benefits, the Secretary's position would make it impossible for providers ever to ascertain their rights definitively.[6] The resulting uncertainty could impede effectua-

[6] Under the Secretary's argument, even if CHS had obtained advice directly from the Health Care Financing Administration

tion of Congress' purpose in enacting Medicare—to provide health care for the aged—by placing Medicare providers in a position where patient care services cannot be rendered unless there is absolutely no question but that the provider will be reimbursed. Failure to permit reliance on an intermediary's advice could also encourage providers to seek to bypass the intermediary, altering the congressional scheme and placing additional administrative burdens on the Secretary.

In sum, the Secretary is incorrect in asserting that this Court has rejected the application of estoppel against the government. The majority of the courts of appeals have held that certain government actions will form the basis for estoppel, and this Court has carefully avoided any categorical ruling on the question. Further, the claims that operation of government will be significantly harmed if parties are permitted, in limited circumstances, to estop the government are untenable. Permitting estoppel is consistent with the approach taken by this Court under the Due Process clause, and with a general recognition that the government should be bound by similar requirements of fairness as are applied to private parties. *See Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982). The Court should reject the categorical preclusion of estoppel urged by the Secretary.

II. Estoppel Was Properly Applied to the Secretary's Claim against CHS

The Third Circuit correctly found that the Secretary is estopped from recouping payments made to CHS following the intermediary's decision that CHS should not offset CETA grants in computing its Medicare reimbursement. In attempting to show that CHS did not reasonably rely on the advice of the intermediary, the Secretary has painted a distorted picture of the Medicare program, the

---

(HCFA), the Secretary would be free to change her position and insist on recovering funds paid to CHS based on the original advice.

role of the fiscal intermediary, and the process of interim payments with subsequent adjustments.

The requirements for estoppel were present in this case. CHS sought an interpretation from its fiscal intermediary—the Secretary's agent—which under the Medicare scheme is the established contact point for providers to obtain guidance concerning Medicare policy. The advice given CHS was based on a reasonable construction of the Medicare regulations, and it was proper for CHS to rely on the intermediary's judgment in planning its operations even if the Secretary later disavowed her agent's interpretation. Further, CHS changed its position based on the intermediary's directive and will be harmed if it is made to bear the burden of the Secretary's repudiation of her agent's decision.

The Secretary argues (Pet. Br. 28-29) that a provider like CHS can never rely on an intermediary's advice since the Medicare program contemplates adjustments to providers' reported costs with subsequent recoupment of excess interim payments. Closely linked to this argument is the contention (Pet. Br. 23-24) that acceptance of estoppel would foreclose carrying out of Congress' plan under Medicare. The Secretary suggests, therefore, that there could never be reasonable reliance in the Medicare context on representations by intermediaries (Pet. Br. 33).

The Secretary confuses the instant situation—where a provider faced with a decision on treatment of one particular item repeatedly asked for and received advice from the intermediary *before* receiving interim payments or incurring costs—with the normal situation where a provider's interim payments (which by their very nature are tentative) are adjusted when definite figures become available. A normal interim payment to a provider does not bespeak any determination of allowable costs, and the Secretary is certainly entitled to recoup earlier interim payments when errors in estimates and accounting procedures are discovered.

The limited purpose of the Secretary's regulation permitting retroactive adjustment was described in *Columbia Heights Nursing Home and Hospital, Inc. v. Weinberger*, 380 F. Supp. 1066, 1072 (M.D. La. 1974), where the court stated:

> "[T]he purpose of this regulation is simply to bring the interim payments, made on an estimated basis to the provider, into agreement with the actual amount to which he is entitled based upon actual rather than estimated costs. . . . Neither the Act nor the regulations contemplated the rules to be changed after the game has been played."

In *Columbia Heights*, the court rejected the retroactive application of a new accounting system since the provider had in good faith followed a system mandated by the Secretary's agent. Moreover, as in this case, the first notice to the provider came long after it could have changed its operation to prevent a loss. *See Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1082 n.14 (1st Cir. 1977).

The Third Circuit also recognized this distinction in rejecting estoppel against the Secretary in *New Jersey v. Department of Health and Human Services*, 670 F.2d 1284, 1296-97 (3d Cir.), *cert. denied*, 103 S. Ct. 56 (1982). There, New Jersey claimed that it was entitled to additional reimbursement under Medicaid even though its approved state plan had not covered the individuals to whom services were provided. New Jersey asserted that it should nevertheless receive the additional reimbursement because the Secretary had failed to inform the State that coverage for those individuals was available. The court of appeals found, however, that there had been no misrepresentation or wrongful concealment which led to the State's detriment.

This case, however, is different. Here a determination was made by the Secretary's authorized agent, *prior to*

CHS' filing its cost reports, that CETA funds did not have to be offset, and CHS proceeded on the basis of that determination. The fact that CHS sought and obtained a definitive ruling from the Secretary's agent sets this situation apart from the normal reimbursement proceedings to which the Secretary alludes.

The courts of appeals have required that estoppel be predicated on an affirmative act. *E.g.*, *Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982); *Oki v. INS*, 598 F.2d 1160, 1161-62 (9th Cir. 1979). Under this standard, the lack of government action prior to or at the time interim payments are made to providers would not establish any reliance. Only in the situation of CHS, which sought and received a ruling from the Secretary's agent before seeking reimbursement, does estoppel become an issue. The Secretary's contrary argument is only another attempt to obscure, under the guise of potential disaster for Federal programs, the injustice which would be done to CHS.

The Secretary's position would undermine stability in the Medicare system since any reimbursement decision—even one made at the Secretary's explicit direction—could be overturned and the provider forced to suffer the consequences of its good faith reliance, no matter how well-established. The regulation permitting reopening of cost determinations merely enables the Secretary to seek recoupment for past payments where specific types of errors or oversights, not present here, have occurred; it does not automatically entitle her to that relief, and the Secretary's argument that the regulation means more is mere bootstrapping.

In support of her contention that CHS could not reasonably have relied on the directions it received, the Secretary disputes (Pet. Br. 30 n.10) the court of appeals' conclusion that, in seeking direction from the intermediary, CHS had sought the most authoritative advice it

could obtain. This argument fails on several counts. First, although CHS could have made an independent determination that the intermediary was wrong and not sought Medicare reimbursement for the employees covered under the CETA grants, that action would have eliminated any possibility of receiving the funds if the intermediary had been correct. Failure to seek reimbursement would have reduced the level of service CHS provided, a step which, in view of the intermediary's conclusion, should not be deemed necessary for CHS to protect itself.

Second, the fiscal intermediary is the entity which providers are supposed to deal with in conducting their operations. Under 42 U.S.C. § 1395h(a), a provider nominates an intermediary to determine the amount of the payments required to be made under Part A of the program and to make those payments. Further, the statute specifies that the fiscal intermediary may "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary." 42 U.S.C. § 1395h(a)(2)(A). The structure and operation of the program clearly contemplate that providers will deal directly with their fiscal intermediaries and not the Secretary.

Under 42 U.S.C. § 1395h(f), the Secretary must evaluate intermediary performance in determining whether to enter into, renew, or terminate an agreement with a fiscal intermediary. The Secretary's regulations specify that an intermediary must have "the overall resources and experience to administer its responsibilities under the Medicare program" and presumes that this requirement is met if the organization "has at least five years experience in paying for or reimbursing the cost of health services." 42 C.F.R. § 421.110(c)(3). One of the specific performance criteria developed by the Secretary, 42 C.F.R. § 421.120(e)(3), involves the intermediary's capability in applying reimbursement principles:

"[T]he intermediary must:

* * * *

(3) Accurately apply the principles of reimbursement to assure that only reasonable and allowable costs incurred in furnishing covered services to Medicare beneficiaries are reimbursed by the Medicare program based on cost reports received from providers. . . ."

Finally, administrative review of many reimbursement decisions is conducted by the intermediary itself, not the Secretary. 42 C.F.R. § 405.1809.[7] Thus, fiscal intermediaries are selected based upon their expertise in reimbursement matters and intended to be the contact point between providers and the Secretary on such matters.[8]

A further indication of the importance placed on the role of intermediaries is section 14 of the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Pub. L. No. 95-142, which authorized the Secretary to assign or reassign providers to certain intermediaries if

---

[7] For cost reporting periods ending prior to June 30, 1973, fiscal intermediaries were responsible for providing hearings on all matters where the amount in controversy was at least $1,000. 42 C.F.R. § 405.1809. For periods ending on or after June 30, 1973, intermediaries are responsible for conducting hearings where the amount of program reimbursement in controversy is at least $1,000 but less than $10,000. *Id.* For cost reporting periods ending on or after June 30, 1973, hearings for matters involving $10,000 or more are conducted by a statutorily established Provider Reimbursement Review Board. 42 U.S.C. § 1395oo.

[8] A few providers deal directly with the Secretary through the Office of Direct Reimbursement. 42 U.S.C. § 1395g. As of August 1983, the Secretary's data indicated that 1,211 of the 12,800 providers and other entities that currently participate in the Medicare program receive payment directly from the Secretary. 48 Fed. Reg. 34979. Under the statute, dealing with a fiscal intermediary or the Secretary's Office of Direct Reimbursement are equally acceptable alternatives. Accordingly, providers have no reason to place less reliance on a determination by an intermediary than they would on the same determination by an HHS official.

she determines that such actions would result in more effective and efficient administration of the Medicare program. The Secretary was also given the authority to designate regional or national intermediaries for different classes of providers. *See* 42 C.F.R. §§ 421.114, 421.116. Further, section 930(o) of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, amended the statute to require the Secretary to designate regional intermediaries for freestanding (i.e., nonaffiliated) home health agencies.[9]

There are no established or mandated procedures for providers to use to address to the Secretary questions such as the one raised by CHS. In this case, the fiscal intermediary operated as the Secretary's agent and by virtue of its selection as an intermediary had been determined to possess expertise on which CHS could reasonably rely. In applying estoppel in *Moser*, this Court found it significant that Moser had sought advice "from the highest authority to which he could turn. . . ." 341 U.S. at 46. By repeatedly questioning the intermediary, CHS did the same, and the Secretary is wrong in arguing that CHS had to treat the intermediary's advice as meaningless.[10]

---

[9] The Secretary has recently proposed rules to reduce the number of providers that deal directly with the Secretary's Office of Direct Reimbursement. 48 Fed. Reg. 34979. The Secretary justified the effort to withdraw from direct reimbursement activities by stating her intention "to contract with existing or newly established Medicare fiscal intermediaries or other organizations, whose accountants are also specialists in Medicare principles of provider reimbursement." *Id.* at 34981. This rulemaking proceeding followed an earlier attempt by the Secretary to phase out the Office of Direct Reimbursement. That proceeding was enjoined because of the Secretary's failure to comply with the Administrative Procedure Act. National Association of Home Health Agencies v. Schweiker, 690 F.2d 932 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1193 (1983).

[10] The suggestion by the Secretary that CHS' repeated requests for advice demonstrate uncertainty so as to foreclose reliance on the intermediary's ruling is fundamentally at odds with the Secretary's regulations and Congressional pronouncements favoring close consultation between providers and intermediaries. Under the Sec-

The intermediary's conclusion that CETA funds did not have to be offset was also reasonable. It did not directly conflict with either the statute or the Medicare regulatory scheme. Thus, contrary to the Secretary's argument (Pet. Br. 32), CHS had no reason to question the intermediary's judgment.[11] First, the statute says nothing about offsets for grants received by a provider, but only sets a standard of "reasonable cost." 42 U.S.C. § 1395x(v)(1)(A). The Medicare regulations authorize providers to receive unrestricted gifts and grants without reducing the costs they report for Medicare reimbursement purposes. 42 C.F.R. § 405.423(a). Thus, the Secretary has not construed Congress' intent as precluding reimbursement in all instances where providers receive payments from other sources for the same expenses.

While the Secretary did state a general policy in the Medicare regulations of offsetting donor-restricted funds, 42 C.F.R. § 405.423(c)(2), the Medicare Provider Reimbursement Manual published by the Secretary admits of an exception to that policy for "seed money," defined as "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies. . . ." [12] Contrary to the Secretary's claim, there was no absolute policy requiring that CETA grants

---

retary's proposed standard, a single request might be deemed reliable, but not a continuing consultation. The Ninth Circuit has correctly held that the repetition of misinformation by a government official adds to the injustice of a subsequent refusal to stand by that advice. *Johnson v. Williford*, 682 F.2d at 872.

[11] This Court commented in Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981), that

> "The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.' *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (CA 2 1976), cert. denied, 430 U.S. 984 (1977)."

[12] HIM-15, Pt. 1 § 612.2.

be offset since, at least for seed money, no such offset was required. Thus, seed money and other types of gifts and grants often do not reduce a provider's allowable Medicare costs.

The grants CHS received under CETA were used to employ new personnel to expand the services CHS provided. *Community Health Services*, 698 F.2d at 617. Since expansion of services of established agencies is one of the functions of seed money, the intermediary's conclusion that the CETA grants were seed money was not so unreasonable as to have alerted CHS that the advice was wrong. Although the Secretary may have acted within her discretion in ultimately determining that CETA funds must be offset by a Medicare provider, her argument that the contrary advice given by her agent clearly offended the Medicare scheme has no merit. Moreover, the Secretary's subsequent rejection of her agent's interpretation does not justify penalizing the innocent provider (as opposed to the agent which gave CHS the repeated assurances) for its reliance on the original advice.

In *Molton, Allen and Williams, Inc. v. Harris*, 613 F.2d 1176 (D.C. Cir. 1980), the court pointed out that in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Department of Agriculture regulations (which were referenced in the insurance application) had explicitly excluded reseeded crops from coverage. The application, therefore, gave Merrill at least constructive notice that the insurance he sought was not available. Where no statute or regulation explicitly applies, the D.C. Circuit reasoned that it could not rule out estoppel based on acts of government agents. *Id.* at 1179. Neither the statute nor the Medicare regulatory scheme explicitly required offset of CETA payments; indeed the payments arguably did constitute seed money in which case CHS' actions would have been explicitly permitted.

By contrast, the First Circuit held that estoppel could not apply in *Nason v. Kennebec County CETA*, 646 F.2d 10 (1st Cir. 1981), since the local CETA director had been advised, prior to hiring an individual, that his employment would not be covered under the Act. In that situation, the local CETA organization could not contend that it had relied to its detriment on any misinformation. In the instant case, however, it was quite reasonable for CHS to rely on the intermediary's interpretation of the regulations; indeed as a practical matter, it had little choice but to do so. Under the principle recognized in *Molton*, the Secretary should be estopped from retroactively rescinding that interpretation. *See Portmann*, 674 F.2d at 1158, 1163 (estoppel warranted on basis of following plausible, albeit incorrect, interpretation of regulations).

There is also no doubt that CHS would be harmed if, despite its reliance on the intermediary, the Secretary were able to recover the payments made to CHS. In many cases where estoppel has been denied, the private party did not worsen its position based on the misinformation it received. For example, in *Merrill*, the farmer would have been uninsured even if he had not been misinformed, since there was no other insurance he could have obtained. *See Portmann*, 674 F.2d at 1162-63.

By contrast, the incorrect advice here adversely affected CHS, since CHS relied on it both in planning its operations and in seeking reimbursement.[13] CHS ex-

[13] Under the Medicare program, a provider's reimbursement is limited to its reasonable costs, 42 U.S.C. § 1395f(b), and it may not charge program beneficiaries for items or services not covered by the Medicare program, 42 U.S.C. § 1395cc(a)(1). Because of these limitations, CHS' plight in the instant case is evident. Due to the fiscal intermediary's advice, CHS received monies which it legitimately expended to furnish needed health services to Medicare beneficiaries. The Secretary now seeks to recoup these sums, which would leave CHS with no recourse to obtain funding for the services it rendered.

panded the services it provided based on the intermediary's determination that the CETA funds should not reduce CHS' allowable costs under Medicare. Obviously, if the intermediary had concluded otherwise, CHS would not have undertaken the expansion. Consequently, its position, unlike Merrill's, will be adversely affected as a result of the misinformation it received if recoupment is allowed. *See Akbarin v. INS*, 669 F.2d 839, 943-44 (1st Cir. 1982) (requiring adverse change in position based on government misconduct as condition for estoppel). The fact that CHS may not have been entitled to the additional reimbursement cannot obscure the fact that it will suffer if it must repay those amounts.

Finally, the Secretary contends (Pet. Br. 34-35) that spending monies improperly obtained from the government is not a ground for resisting recoupment. Regardless of whether this is so in general, it is quite different to conclude, as part of an estoppel analysis, that repayment would not be a detriment to CHS.[14]

CONCLUSION

For the above reasons, these *amici* submit that when the government deals with private parties, there should be no categorical rule that the actions of its agents cannot result in estoppel. Where a provider relies in good faith on the specific rulings of the Secretary's agent, the innocent provider should not be penalized. As the Seventh

---

[14] CHS is not seeking a benefit from the government; instead the Secretary is asserting a right to recoupment. It has long been held that even if equitable principles such as laches and estoppel may not apply in claims against the government, "when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected." United States v. Stinson, 125 F. 907, 910 (7th Cir. 1903), *aff'd*, 197 U.S. 200 (1905); *see* Carr v. United States, 98 U.S. 433, 438 (1879). Since the Secretary seeks to use the courts to recover funds, *Stinson* and *Carr* hold that the Secretary cannot claim an exemption from normal rules of equity.

Circuit commented in *Portmann*, "a concern for administrative efficiency should not permit the government to deal unfairly or capriciously with its citizens." 674 F.2d at 1160. CHS conscientiously sought a ruling from the fiscal intermediary, the designated agent of the Secretary that was responsible for providing direction to CHS on Medicare reimbursement matters. CHS relied on the advice it received, and the fact that the Secretary subsequently repudiated the intermediary's conclusion should not harm the innocent provider. To hold otherwise would be harmful to the administrative scheme established under Medicare by preventing providers from relying on the organizations which were specifically established by statute to deal with providers on Medicare reimbursement policy. Precluding estoppel in appropriate cases could also result in a diminution of services for the citizens Congress intended to protect under the Medicare program. Moreover, a rule barring estoppel could prompt providers to seek ways to bypass the intermediary to obtain advice, thereby increasing the cost and burden of administering the Medicare program. The decision of the court of appeals should be affirmed.

Respectfully submitted,

JACK N. GOODMAN *
EUGENE TILLMAN
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for National Association for Home Care, et al., Amici Curiae

* Counsel of Record

December 30, 1983